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No. 584

In the Supreme Court of the United States

OCTOBER TERM, 1942

HONORABLE MICHAEL J. ROCHE, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, PETITIONERS

v.

EVAPORATED MILK ASSOCIATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 130) is reported in 130 F. (2d) 843.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 12, 1942 (R. 148, 149). Petition for certiorari was filed De-

cember 12, 1942, and was granted February 8, 1943 (R. 152). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the court below was authorized to issue a writ of mandamus to the district court to correct its alleged error in ruling upon the sufficiency of respondents' pleas in abatement.

(2) Whether the district court's order striking respondents' pleas in abatement was correct.

STATUTES INVOLVED

Section 262 of the Judicial Code (28 U. S. C., Sec. 377) provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 128 (a) of the Judicial Code (28 U. S. C., Sec. 225 (a)) provides in part that:

> The circuit courts of appeals shall have appellate jurisdiction to review by appeal final decisions. * * *

Section 284 of the Judicial Code (28 U. S. C., Sec. 421) provides in part:

> A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any

grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months: *Provided,* That, for good cause shown, the court may, at any time after the end of the term for which the grand jury was originally summoned, excuse any member of the grand jury and summon and impanel another person in his place. * * *

STATEMENT

An indictment returned in June 1941 in the United States District Court for the Northern District of California, Southern Division, in a case entitled *United States of America* v. *Evaporated Milk Association, et al.*, charged respondents and certain other defendants with conspiring to fix the prices of evaporated milk sold in certain states and territories, in violation of Sections 1 and 3 of the Sherman Act (R. 12–21). The indictment stated that the grand jury which returned the indictment had been impaneled at the November 1940 Term of court, that it had "begun but not finished during said November 1940 Term of said Court, an investigation of the matters charged in this indictment," and that, by order of the court, it had continued to sit during the March 1941 Term for the sole purpose of finishing investigations begun but not completed during the November Term (R. 12–13).

In September 1941, respondents filed pleas in abatement[1] asking that the indictment returned against them be quashed (R. 34–48). The pleas averred, on the basis of the minutes of the grand jury for its meeting of February 27, 1941, that no investigation of any matter mentioned in the indictment had been "begun" by the grand jury, within the meaning of Section 284 of the Judicial Code, during the November 1940 Term of court, which expired March 2, 1941. In fact, the very

[1] Respondents in their brief in opposition to certiorari questioned the propriety of referring to their pleas as pleas in abatement and asserted that the pleas went to the jurisdiction of the court. In the court below, both the majority opinion and the two dissenting opinions referred to the pleas as pleas in abatement (R. 130, 131, 135, 147).

While the proper nomenclature for respondents' pleas is probably not of importance in this case, we submit that they are true pleas in abatement. Such pleas are used to avoid and abate an indictment illegally found. A plea to the jurisdiction attacks the jurisdiction of the court either over the offense or over the location at which it was committed. 4 *Blackstone Commentaries* 333. Since such a plea is preliminary to any objection to the proceeding itself and aims to show that there is no necessity for any defense (1 Chitty, *Criminal Law* (1st Amer. Ed., 1841, 436) and since it pleads grounds for refusal to answer in the court in which the action is brought rather than grounds for abating the action, it does not properly conclude, as did respondents' pleas (R. 41, 46), with a prayer that the indictment be quashed (Stephen, *Principles of Pleading* (3d Amer. Ed., 1892), Appendix xxii). When a plea to the jurisdiction is sustained "the indictment may not be dismissed" and the court orders the defendants discharged from custody. *United States* v. *Schouweiler*, 19 F. (2d) 387, 388 (S. D. Calif.)

[2] R. 39–40, 42–43, 44–46.

minutes relied on stated the contrary, namely, that investigation was begun of several industries, including Canned and Evaporated Milk. (R. 33–34, 44. See pp. 38–39, *infra*.) The Government filed replications in the nature of general denials to these pleas (R. 51–52) but later, with leave of court, withdrew its replications and filed motions to strike the pleas in abatement (R. 52–55). The grounds for these motions were that the pleas did not state specific facts with sufficient certainty, that the facts alleged could not be within the pleaders' own knowledge, and that the pleas were insufficient in law (R. 53–54). The court, after hearing, granted the motions to strike the pleas (R. 69–70).[1]

Respondents thereupon instituted in the court below the present mandamus proceedings against petitioners, the judge of the district court and the district court, praying that they be required to reinstate the pleas in abatement and the replications thereto and to set the issues raised by the pleas for jury trial (R. 1–12). The court heard the case on the petition for writ of mandamus and the return to the show cause order (R. 56–64). On March 4, 1942, the court, without opinion,

[1] With respect to the first, second, and third pleas of respondent Carnation Company, the Government filed a demurrer rather than a motion to strike (R. 54). The demurrer was granted (R. 70). Respondents application for a writ of mandamus refers only to the motion to strike (R. 9–12).

issued an order granting the relief prayed by respondents (R. 124–125).

The court subsequently granted a rehearing and specifically ordered that it be heard before the seven circuit judges sitting *en banc* (R. 128). In an opinion rendered September 12, 1942, the court, with two judges dissenting and one not participating in the decision (R. 134, 135–146, 147), held that it had jurisdiction to issue mandamus, that the district court had erred in striking the pleas in abatement, that the facts justified intervention by mandamus, and that a writ of mandamus should issue to require petitioners to reinstate the pleas in abatement and the replications thereto and to try the factual issues thus raised (R. 130–134). The court did not decide whether this trial should be before a jury (R. 134). An order directing that the writ of mandamus issue in accordance with the court's opinion has been stayed pending the filing of a petition for writ of certiorari and final action thereon by this Court (R. 150).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that mandamus will lie to reverse the action of the district court in striking pleas in abatement for insufficiency.

(2) In holding that the order of the district court striking pleas in abatement for insuf-

ficiency constituted a refusal to act upon the pleas.

(3) In holding that the district court erred in striking the pleas in abatement.

(4) In ordering that a writ of mandamus issue.

SUMMARY OF ARGUMENT

I

A. The District Court's ruling that respondents' pleas in abatement were insufficient in law was an exercise of the court's judicial discretion, not a refusal to adjudicate. It is settled that a writ of mandamus cannot be used to perform the office of an appeal to review the judicial action of an inferior court taken in a matter within its jurisdiction. Here the District Court undoubtedly had jurisdiction to pass upon the sufficiency of the pleas in abatement. The issue raised did not become "jurisdictional" because the court struck the pleas as insufficient instead of letting them go to the jury. Respondents are thus seeking to use the extraordinary process of mandamus, not to compel action by the proper tribunal, but for the purpose of correcting alleged error by requiring a court to act in a particular way.

B. Even if an issue is regarded as jurisdictional, mandamus will not lie where a remedy by the ordinary processes of appeal is available. It is also clear that if appellate review is expressly

prohibited by statute, the statute cannot be evaded through the use of mandamus in lieu of appeal. In the instant case, unless R. S. 1011 stands in the way, respondents may present their contentions with respect to the pleas in abatement to the appellate courts after the trial on the merits. The fact that such a trial may put them to expense and inconvenience does not entitle them to review at an intermediate stage of the proceedings. If, on the other hand, R. S. 1011 is interpreted as prohibiting reversal on appeal, its policy cannot be nullified by resort to mandamus.

C. Apart from certain specified exceptions, circuit courts of appeals have jurisdiction to review only "final decisions" of district courts. The object of this restriction is to forbid piecemeal disposition of cases on appeal, and to avoid the harassment and costs of a succession of separate appeals from interlocutory rulings. *Cobbledick v. United States*, 309 U. S. 323. The prevention of dilatory appeals is particularly important to the effective administration of criminal justice. The statutory limitation upon the jurisdiction of the circuit courts of appeals cannot be overcome by using the writ of mandamus as a means of appealing from nonfinal orders.

D. Section 262 of the Judicial Code authorizes circuit courts of appeals only to issue writs "which may be necessary for the exercise" of their appellate jurisdiction. In the instant case, no showing can be made that the striking of respond-

ents' pleas in abatement will defeat or in any other way impair the exercise of any jurisdiction which the circuit court of appeals may possess.

II

A. The facts set forth in respondents' pleas do not adequately aver noncompliance with the provisions of Section 284 of the Judicial Code. The allegations that the grand jury had not begun its investigation of matters covered by the indictment during the November 1940 Term were made solely on the basis of the grand jury minutes, and these state precisely the contrary.

B. Where a grand jury duly impaneled and duly extended to a second term returns an indictment in a matter investigation of which was not begun during its first term, this is not ground for abating the indictment. The object of the limitation upon the functions of a grand jury during an extended term was to protect the jurors, and not those accused. Insofar as defendants are concerned, the limitation should be regarded as directory and not mandatory.

ARGUMENT

I

The Court Below Was Without Authority to Issue Mandamus in This Case

The jurisdiction of circuit courts of appeals is wholly statutory and their power to issue writs of mandamus is derived from Section 262 of the

Judicial Code. This section (*supra*, p. 2) authorizes the circuit courts of appeals to issue writs not specifically provided for by statute, such as the writ of mandamus, which may be "necessary for the exercise of" their jurisdiction and "agreeable to the usages and principles of law." We shall show that the issuance of the writ in this case was not "agreeable to the usages and principles of law" (1) because the writ cannot be used to review an exercise of judicial discretion in a case in which the trial court has neither refused to act where it should have, nor acted in a manner beyond its jurisdiction (*infra*, pp. 11–19); (2) because, in any event, the writ will not issue where there is a remedy available through the ordinary process of appeal, or where a statute prohibits review of an order by appeal (*infra*, pp. 19–30); and (3) because the limitation of the appellate jurisdiction of the circuit courts of appeals to "final decisions" precludes use of mandamus to review interlocutory orders (*infra*, pp. 30–33). Furthermore, the issuance of the writ was not "necessary for the exercise" of the appellate jurisdiction of the court below (*infra*, pp. 34–37). For all of these reasons the issuance of the writ in this case violated both the basic principles as to the nature of mandamus, and the limitation that this extraordinary writ may not be employed as a substitute for ordinary appellate procedure.

A. THE THEORY UPON WHICH THE COURT BELOW ISSUED MANDAMUS VIOLATES THE PRINCIPLE THAT MANDAMUS WILL NOT ISSUE TO AN INFERIOR COURT, ACTING WITHIN ITS JURISDICTION, TO REVIEW ITS JUDICIAL ACTION OR ITS EXERCISE OF JUDICIAL DISCRETION

This Court has consistently and repeatedly held that a writ of mandamus cannot be used to perform the office of an appeal or writ of error to review the judicial action of an inferior court and that, in cases where the inferior court had jurisdiction and was not exceeding its statutory powers, the sole function of the writ is to require the court to act where it has refused to do so. *Ex parte Davenport*, 6 Pet. 661; *Ex parte Newman*, 14 Wall. 152, 165–166; *Virginia v. Rives*, 100 U. S. 313, 323; *American Construction Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372; *In re Pollitz*, 206 U. S. 323, 331; *Interstate Commerce Commission v. United States*, 289 U. S. 385, 393–394. In *Ex parte Newman*, 14 Wall. 152, 169, this Court, in refusing to issue a writ of mandamus, said:

> Superior tribunals may by mandamus command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed. If the duty is unperformed and it be judicial in its character the mandate

> will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be done, or if it be ministerial, the mandamus will direct the specific act to be performed.

In *In re Pollitz*, 206 U. S. 323, 331, this Court said:

> But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.
>
> Where the court refuses to take jurisdiction of a case and proceed to judgment therein, when it is its duty to do so and there is no other remedy, mandamus will lie unless the authority to issue it has been taken away by statute. * * *

In the present case it is clear that the District Court did not refuse to take jurisdiction or to exercise its judicial discretion. On the contrary, the motions to strike the pleas in abatement were fully argued before the court (R. 70), and the court acted judicially in passing upon them.[1]

[1] For the reasons set forth in Point II, *infra*, pp. 38–45, we think the District Court's decision was correct. But in any event, we believe that that argument and the reasoning of the opinions of the two dissenting judges below (R. 135–137, 147) demonstrate indubitably that the decision was not unreasonable or an abuse of discretion.

is thus obvious that the substance of respondents' objection is not that the court refused to act, or that the motions to strike were heard before the wrong tribunal, but that its decision was erroneous. The purpose and effect of the writ is to compel the court to determine the motions "in a particular way"—that is, to deny them.

Plainly, "if the mandamus were to stand, the result would not be to compel the [court] to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action." *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394.

The court below sought to justify its granting of mandamus upon the ground that the district court's order striking the pleas in abatement was a refusal "to proceed to trial" (R. 131). The court relied upon cases holding that where a trial judge refuses to perform a duty imposed by law he can be compelled by mandamus to do so even though his refusal was an exercise of judgment (R. 131–132). This can be conceded for pur-

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[1] *Barber Asphalt Paving Co.* v. *Morris*, 132 Fed. 945 (C. C. A. 8).

poses of this case.[6] But it is clear that the order sustaining the motions to strike, like an order sustaining a demurrer, was not a refusal to try but an adjudication that respondent's pleas were insufficient in law. Such a judgment, based on the pleadings, is entitled to as much weight as is an exercise of judicial discretion, based upon evidence. The mandamus proceeding was thus brought, not to compel action where there had been a refusal to act, but to correct alleged error committed in the adjudication of a legal question.

Respondents argue that the questions raised involve the jurisdiction of the District Court, and cite cases holding that mandamus is the proper remedy when a court or judge has no jurisdiction over a subject matter, as when a single judge is proceeding to try a case which is required to be heard before three judges.[7] As most closely in point, respondents apparently rely on the cases in which mandamus has been used to require a case to be tried before a jury rather than by an equity court, the Court of Claims, or an auditor. *Ex parte Simons*, 247 U. S. 231; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86; *Ex parte Peterson*, 253 U. S. 300. Those cases, however, hold only that mandamus lies to prevent

[6] But see *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 380.

[7] *Ex parte Bransford*, 310 U. S. 354, 355; *Ex parte Northern Pac. R. Co.*, 280 U. S. 142; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 16.

trial in the wrong tribunal, or the wrong kind of tribunal, a trial without a jury being treated as a different kind of trial than one with a jury.

We shall assume, for purposes of argument, that respondents would be entitled to trial by jury, rather than by the court, of facts alleged in their pleas if the allegations were sufficient. The court below left this question open, and it is by no means clear that jury trial is required, particularly since the issue could not be raised on a plea of not guilty. Cf. *Ford* v. *United States*, 273 U. S. 593, 605–606; *Peper Automobile Company* v. *American Motor Car Sales Company*, 180 Fed. 245 (C. C. E. D. Mo.); but see *Jones* v. *United States*, 179 Fed. 584, 592 (C. C. A. 9). We nevertheless assume, in what follows, that there would be a jury trial on this preliminary issue of fact.

The right to trial by jury means a trial before a judge and jury as contrasted with trial before a judge alone. For in jury trials, the judge and jury together, rather than the jury alone, constitute the tribunal. *Herron* v. *Southern Pac. Co.*, 283 U. S. 91, 95. It is the function of the court to determine matters of law even when a jury is sitting. Prominent among questions which the courts have always decided is whether the pleading states a sufficient claim for relief to permit the case to go to the jury. If the court holds, on demurrer or other appropriate motion, that

no cause of action is stated, the case never goes to the jury. This does not mean that the proceeding has not been heard before the proper tribunal, for the court had jurisdiction to pass upon the legal issues. And even if the judge's ruling, which prevented the issue from reaching the jury side of the tribunal, may have been erroneous, the losing party has not been deprived of his right to trial in the appropriate forum.

Accordingly, no extraordinary remedy, such as mandamus, is available to him. If this were not so, every decision sustaining a demurrer or directing a verdict in an action at law could similarly be treated as a denial of a trial by jury, subject to correction by mandamus if the appellate court thought it erroneous. And, on the same reasoning, if the demurrer were overruled, the losing party could complain that his case was being improperly allowed to go before a jury, that this was the wrong forum, and that he too should be able to have the matter preliminarily determined by the appellate court through issuance of the extraordinary writ. Plainly neither the cases holding that mandamus will lie to protect the right to a jury trial nor those in which the writ has been exercised because a court is acting outside its jurisdiction stand for any such proposition.

Of course, respondents are not suggesting that the district court has no jurisdiction to pass upon the issues raised in the pleas in abatement. On

the contrary, the object of the proceeding for the writ is to compel the court to decide them, though after hearing evidence rather than on the pleadings. Nor do respondents assert that the district court lacked jurisdiction to pass upon the Government's motions to strike the pleas in abatement. The soundness of the points raised by the motions was undoubtedly required to be determined by the judge sitting without a jury. It is thus apparent that respondents' position is merely that the trial court erred in deciding a matter within its jurisdiction in a manner which respondents believe to have been incorrect.

Respondents confuse their claim that the grand jury lacked jurisdiction to return the indictment—which is the question raised by the pleas in abatement—with the jurisdiction of the court to pass upon the pleas. The writ of mandamus is not directed to the grand jury, but to the manner in which the court passed upon the pleas. The court had jurisdiction to pass upon the sufficiency of the pleas, whatever its decision might be. The fact that the pleas raised the question of the jurisdiction of the grand jury does not subject the court's determination on their sufficiency to correction by an appellate court through the process of the extraordinary writ of mandamus.

Furthermore, the pleas do not allege facts showing that the grand jury was without jurisdiction, or that the court would have no jurisdiction to try the offense. Respondents' pleas make no allega-

tion that the grand jury which returned the indictment had not been duly impaneled or that it had not been duly authorized to sit during the March 1941 Term within which it returned the indictment. If the grand jury failed to observe the limitation that, during the March Term, it confine itself to investigations begun during the November Term, this was at most an irregularity in the grand jury procedure,* and not conduct by a jury sitting beyond its authorized term. Nor would it destroy the jurisdiction of the Court to try the case on the merits.

This conclusion is supported by cases involving comparable objections. The asserted irregularity was similar to that which arises when the grand jury is composed of persons not qualified as grand jurors (*Kaizo* v. *Henry*, 211 U. S. 146, 149), when the method prescribed by law for the selection of grand jurors has not been followed (*Matter of Moran*, 203 U. S. 96, 103–104), when the judge who impaneled the grand jury was not within the district in which the court was located (*Harlan* v. *McGourin*, 218 U. S. 442, 451), or when there was failure to observe the statutory requirement that the foreman of the grand jury keep a record of the number of grand jurors concurring in the finding of the indictment and file this record with the clerk (*United States* v. *Par-*

* We later contend (*infra*, pp. 43–47) that an irregularity of this kind does not constitute ground for abating the indictment.

ker, 103 F. (2d) 857, 860 (C. C. A. 3), certiorari denied, 307 U. S. 642). Such irregularity is not jurisdictional.* It does not entitle the defendant to release by habeas corpus, as would be so if it deprived the court of jurisdiction to try the offense. As this Court said in *Kaizo* v. *Henry, supra*, at p. 149:

> * * * the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error.

Ex parte Bain, 121 U. S. 1, upon which respondents rely, involved a wholly different situation. In that case the district court, on motion of the Government, assumed to amend the indictment. The defendant was tried and sentenced upon this "amended" indictment for an offense for which, under the Constitution, he could be tried only upon indictment by a grand jury.

* The irregularities in the cases cited involved statutory provisions designed to protect defendants. The limitation upon matters to be considered by a grand jury during an extension of its term had no such purpose (see pp. 47–48, *infra*), and there is no reason to assume that a defendant will be prejudiced by having his case come before one grand jury rather than another.

Since the "amended" indictment had not been returned by a grand jury, it gave the court no jurisdiction to try the defendant and he was entitled to obtain his release by habeas corpus.

B. MANDAMUS DOES NOT LIE BECAUSE (1) A REMEDY BY APPEAL IS AVAILABLE, OR (2) THE STATUTORY PROHIBITION AGAINST REVERSAL BY APPELLATE COURTS FOR ERRORS IN RULING ON PLEAS IN ABATEMENT PRECLUDES REVERSAL THROUGH USE OF MANDAMUS

For the reasons set forth in the preceding section, we think it clear that the remedy of mandamus does not apply to the situation here presented. In addition, even if this case could be regarded as one to compel a court to "proceed to trial" or to recognize a party's right to a jury trial rather than one before a court sitting without a jury, it would have been erroneous to have issued the writ. This follows from two recognized limitations upon the right to mandamus. In the first place, the remedy is not available if the point can be brought before the appellate court through ordinary processes of appeal. Secondly, if it cannot be heard on appeal by reason of an express statutory prohibition, appellate review in violation of the policy of the statute cannot be obtained through the use of the writ of mandamus.

In the court below a considerable portion of the argument turned on the effect of R. S. 1011 (28 U. S. C., Sec. 879), which provides that:

> There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact.

The Government contended that this section *precluded the circuit court of appeals from* reversing the district court on its ruling on the plea in abatement. Respondents argued that this case came within the exception for "pleas to the jurisdiction of the court," that the entire section was inapplicable to criminal cases,[20] and that the section was in part superseded by the Act of May 9, 1942, 56 Stat. 271 (18 U. S. C., Sec. 682), allowing the United States to appeal from decisions on pleas in abatement.

Since, in view of the two principles to which we have referred, mandamus does not lie in either event, we do not continue the controversy as to whether R. S. 1011 is applicable. If respond-

[20] In a number of criminal cases the courts have, on appeal, reviewed the correctness of a trial court's ruling on a plea in abatement without reference to R. S. 1011. See p. 23, n. 14. But in at least three criminal cases the section has been cited as barring appellate review of rulings on pleas in abatement. *Biemer* v. *United States*, 54 F. (2d) 1045 (C. C. A. 7), certiorari denied, 286 U. S. 566; *Mounday* v. *United States*, 225 Fed. 965, 967 (C. C. A. 8), certiorari denied, 239 U. S. 645; *Luxenberg* v. *United States*, 45 F. (2d) 497, 498 (C. C. A. 4), certiorari denied, 283 U. S. 820. This Court has also referred to the section in a criminal case as preventing reexamination of "questions of fact" upon writ of error. *Miles* v. *United States*, 103 U. S. 304, 313.

ents were right in their contention below, they can challenge the district court's decision on the pleas in abatement through the ordinary processes of appeal, as any error on an interlocutory matter can be raised on appeal from an adverse final judgment. If this can be done, mandamus will not lie because the point, whether or not jurisdictional, can be tested on appeal. If, on the other hand, R. S. 1011 prohibits reversal on appeal, the section cannot be evaded through permitting appellate reversal on mandamus.

1. *Mandamus does not lie where a remedy through the ordinary processes of appeal is available.*

If R. S. 1011 does not stand in the way, respondents may correct the alleged error in ruling on the pleas in abatement on appeal after trial of the case. On appeals from judgments of conviction in federal district courts, the appellate courts have often considered whether the trial court erred in striking or sustaining demurrers to pleas in abatement.[11] Many cases have recognized that appeal after trial and final decision is an adequate remedy and that mandamus is not available if there is such remedy, irrespective of

[11] *Atyeo* v. *United States*, 165 U. S. 36, 43–45; *Hyde* v. *United States*, 225 U. S. 347, 373–374; *Olmstead* v. *United States*, 19 F. (2d) 842, 845 (C. C. A. 9), affirmed, 277 U. S. 438; *Shushan* v. *United States*, 117 F. (2d) 110, 113 (C. C. A. 5), certiorari denied, 313 U. S. 574; *United States* v. *Johnson*, 123 F. (2d) 111, 117–120 (C. C. A. 7), now before this Court on writ of certiorari, No. 4, this Term.

whether the question presented is jurisdictional.[12] *Ex parte Baltimore & O. R. Co.*, 108 U. S. 566; *Ex parte Harding*, 219 U. S. 363; *Ex parte Oklahoma*, 220 U. S. 191, 209–210; *Ex parte Metropolitan Water Company*, 220 U. S. 539; *Ex parte Roe*, 234 U. S. 70; *Ex parte Park Square Automobile Station*, 244 U. S. 412, 415; *Ex parte Slater*, 246 U. S. 128; *Ex parte Tiffany*, 252 U. S. 32, 37; *Ex parte Riddle*, 255 U. S. 450; *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10, 16.

Illustrative of these decisions is *Ex parte Park Square Automobile Station*, 244 U. S. 412. In that case the federal court for the Northern District of New York refused to remand a case removed to it from a state court in New Hampshire. Despite the rather clear lack of jurisdiction of the New York court, this Court refused to issue mandamus. The fact that the petitioner would be forced to try its case "at great inconvenience and expense as a preliminary to securing a review of the question of jurisdiction" did not "qualify or

[12] We are not here concerned with the special situation in which a case is being heard by a judge barred by statute from exercising jurisdiction and an important public policy embodied in the statute would be defeated by the very progress of the trial before the wrong tribunal. Thus the public interests safeguarded by the acts requiring certain important classes of cases to be heard by three judges would be frustrated if the cases were permitted erroneously to proceed to trial before one judge. *Ex parte Bransford*, 310 U. S. 354. But, as we shall show, the mere inconvenience and expense of a trial are not sufficient to bring a case within this special category.

limit the comprehensive rule * * * that, where statutory methods of review of questions of jurisdiction were provided for, * * * there was no power to override the statutory provisions by resorting to the writ of mandamus" (244 U. S., at 415). The reasons of policy which underlie this rule were stated as follows (p. 416):

> * * * however grave may be the inconvenience arising in this particular case in the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action of the court by resort to a writ of mandamus instead of leaving the correction of the error to the orderly methods of review established by law.

Respondents rely on "special circumstances" as warranting the granting of the writ.[13] Apart from general and argumentative assertions,[14] the only peculiar circumstance mentioned is that "if the parties are remitted to relief on appeal from a final judgment, they and the courts will be sub-

[13] See brief on rehearing in the court below, p. 18.

[14] In their brief on rehearing below (p. 18), respondents listed as among the "special circumstances" upon which they relied: (a) That the action of the trial court has denied petitioners the right to trial by jury; (b) that the questions presented involve matters of public importance in the administration of justice; (c) that the matters presented involve the jurisdiction of the trial court; (d) that the action is a criminal as distinguished from a civil proceeding.

jected to the burden of a long and expensive trial," which would have been unnecessary if the pleas in abatement had been sustained. But there is nothing unusual about this situation. In any case which will take time to try, the parties would be saved inconvenience and expense if all erroneous rulings could be taken to the highest appellate court before trial on the merits. But Congress and the Federal courts have never ventured to assume that preliminary rulings are erroneous and that immediate review would therefore be expeditious. It is unnecessary to elaborate upon the delays which would ensue if litigants could appeal interlocutory rulings on motions while a case was pending in the trial court. See *Cobbledick* v. *United States, infra,* p. 31.

No different policy is warranted for this case, or other antitrust cases, merely because a long trial is anticipated. The desirability, from the standpoint of the public interest, of expedition in antitrust litigation has been explicitly recognized by Congress (Act of February 11, 1903, as amended, 32 Stat. 823, 36 Stat. 854, 1167, 15 U. S. C., Sec. 28), and although the trial may be expensive and time consuming, we dare say that the burden on these respondents will be no greater than that of a relatively short trial upon defendants with lesser resources.[15] Since many antitrust trials are lengthy, on respondents' theory the de-

[15] On this point, see the dissenting opinion of Judge Denman, R. 145–146.

fendants in such cases would have open to them means of delaying final decision not generally available to litigants.

The effect of such special circumstances, when ordinary appellate review was available, was expressly considered in the *Park Square* case, *supra*. It was there held that a "special" circumstance was necessary to permit mandamus even when "no means of review" were provided; but that the existence of facts of precisely the same kind as are urged upon the court here [16] did not warrant disregard of the ordinary statutory methods of review.

Respondents cite *Ex parte Simons*, 247 U. S. 231, *Ex parte Peterson*, 253 U. S. 300, and *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, as holding that preliminary questions may be determined on mandamus in order to avoid putting a party to "the difficulties and the courts to the inconvenience" of proceeding on a basis which might ultimately be found to be mistaken.[17] These three decisions are based on a rather cryptic utterance of Mr. Justice Holmes in the earliest of them, the *Simons* case. The three sentences he devoted to

[16] It was there claimed that the case was exceptional because of "the clearly erroneous construction" of the statute by the court below and the strange result, and because of the "great inconvenience and expense * * * which would result from forcing the petitioner to try its case" in the wrong court before the Court's jurisdiction could be tested on appeal.

[17] These cases are relevant here only if they are not basically distinguishable as involving trials before the wrong tribunal. See pp. 14–15, *supra*.

the point contained no reference to any of the considerations just discussed, or to the *Park Square* case, which held precisely the contrary at the preceding term. The three cases appear to be out of line with the general doctrine, approved in prior and subsequent decisions and supported both by statutory and policy considerations, that mandamus will not lie if a remedy by way of appeal is available, even though a contrary result may be more convenient and economical for a party in a particular case.

It may be of significance that the three decisions involve issuance of mandamus directly by this Court and not by the circuit court of appeals. The latter courts, under Section 128, have jurisdiction only over "final decisions." That section provides statutory reenforcement for the policy against obtaining review of interlocutory orders by mandamus insofar as the jurisdiction of circuit courts of appeals is concerned. See pages 31-34, *infra*. This Court is subject to no such statutory restrictions.[18] Since the present case involves

[18] Under Section 240 of the Judicial Code (28 U. S. C., Sec. 347), this Court may review by certiorari any case pending in a circuit court of appeals before or after decision by that court and irrespective of the interlocutory character of the order involved. *Gay* v. *Ruff*, 292 U. S. 25, 30. It may answer questions of law certified to it by any circuit court of appeals or by the Court of Claims. (Judicial Code, Sec. 239, 28 U. S. C., Sec. 346; Act of February 13, 1925, Sec. 3, 28 U. S. C., Sec. 288.) It may review on direct appeal a number of different types of interlocutory judgments or decrees of district courts. (Section 238, Judicial Code, 28 U. S. C., Sec. 345.)

the power of a circuit court of appeals to issue mandamus, the three cases under discussion may be distinguished on the ground that they were not governed, as is the case at bar, by Section 128. Moreover, inasmuch as they were civil cases, and the present case is criminal, they may be distinguished on the grounds pointed out in the *Cobbledick* case (*infra*, p. 31) that the "considerations of policy" against allowing interlocutory appellate review "are especially compelling in the administration of criminal justice" (309 U. S., at 325). The *Simons*, *Peterson*, and *Skinner & Eddy* cases should at least be held inapplicable to criminal cases and to the issuance of writs by circuit courts of appeals.

2. *Mandamus does not lie where a statute prohibits review by way of appeal*

If R. S. 1011, *supra*, p. 20, should be interpreted as preventing appellate review of the rulings of the trial court on pleas in abatement, the court will not permit such a statutory requirement to be nullified by resort to mandamus instead of appeal. The object of the statute, thus interpreted, would be to prevent such pleas, which are not looked upon with favor, from delaying or otherwise unduly interfering with the trial of cases. This objective would be completely defeated if parties were permitted to present the same questions to an appellate court in a proceeding bearing another name.

In a similar situation, where Congress has provided that there shall be no appeal from orders remanding proceedings to state courts, this Court has repeatedly held that the statutory prohibition against appeals takes away the right to mandamus. *In re Pennsylvania Company*, 137 U. S. 451, 454; *Fiske* v. *Henarie*, 142 U. S. 459, 468; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 581; *McLaughlin Bros.* v. *Hallowell*, 228 U. S. 278; *Ex parte Matthew Addy S. S. & C. Corp.*, 256 U. S. 417; *Employers Reins. Corp.* v. *Bryant*, 299 U. S. 374, 378–381. Cf. *In re Burdett*, 127 U. S. 771.[19] In holding, in the *Pennsylvania Company* case, *supra*, that it was without power to issue mandamus in such cases, the Court said:

> In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The gen-

[19] See also *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394, where the court said with respect to nonreviewable orders of the Interstate Commerce Commission: "A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct review. *I. C. C.* v. *Waste Merchants Ass'n*, *supra*, p. 35. There have been like attempts before in other branches of the law of remedies. * * * They have met with no success."

> eral object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.

Although different kinds of motions are involved, the considerations which prompted Congress to prohibit appeals from orders of remand are undoubtedly akin to those responsible for a similar prohibition with respect to pleas in abatement. The reasoning of the above decisions holding that a statutory ban upon appeals applies to mandamus clearly is applicable to R. S. 1011 as well as to Section 28 of the Judicial Code.

C. THE COURT BELOW WAS NOT AUTHORIZED TO CIRCUMVENT, BY GRANT OF MANDAMUS, THE POLICY ESTABLISHED BY CONGRESS, THAT CIRCUIT COURTS OF APPEALS SHOULD HAVE JURISDICTION TO REVIEW ONLY "FINAL" DECISIONS OF DISTRICT COURTS

Apart from certain specified exceptions,[20] circuit courts of appeals have jurisdiction to review only "final decisions" of district courts.[21] This policy of permitting circuit courts of appeals to review only final decisions has been an integral part of the federal judicial system from the outset. The reasons underlying this policy, and their particular importance as applied to criminal cases, have been recently stated in *Cobbledick* v. *United States*, 309 U. S. 323, 324–326, as follows:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided

[20] See Section 129, Judicial Code (28 U. S. C., Sec. 227).
[21] Section 128 (a), Judicial Code (28 U. S. C., Sec. 225).

> the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases. An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. *Cogen* v. *United States*, 278 U. S. 221.

These considerations are clearly applicable to the case at bar. The statute limiting circuit courts of appeals to review of final decisions would be circumvented and flouted if litigants could employ the writ of mandamus to review interlocutory orders of district courts. If the decision below is upheld in the present case every ruling striking

a plea in abatement or other preliminary plea, as well as every order overruling a demurrer to an indictment, would lay the basis for application for mandamus to the appropriate circuit court of appeals.

American Construction Co. v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, is directly in point. The question there was whether this Court could issue mandamus to a Circuit Court of Appeals with respect to orders made by that court at an intermediate stage of a case. At that time, under R. S. 691 and 692, "the appellate jurisdiction of this court from the Circuit Court of the United States was limited to final judgments at law, and final decrees in equity or admiralty. Acts of September 24, 1789, c. 20, §§ 13, 22, 1 Stat. 81, 84; March 3, 1803, c. 40, 2 Stat. 244; Rev. Stat. §§ 691, 692" (p. 378). In refusing to issue the writ, this Court said (p. 379):

> Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this "would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reexemination"; would "introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it"; would allow an appeal or writ of error upon the same question to be "repeated, to the great

> oppression of the parties"; and "would subvert our whole system of jurisprudence." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 573, 602.

With respect to criminal procedure, Congress has left no doubt that interlocutory review is meant to be prohibited unless expressly authorized. When the Court of Appeals of the District of Columbia construed legislation for the District as permitting interlocutory criminal appeals, Congress promptly legislated to the contrary. Act of July 3, 1926, c. 755, 44 Stat. 831, 18 U. S. C., sec. 683. See *Sinclair* v. *United States*, 273 U. S. 737, 741. The House Committee on the Judiciary on that occasion stated (H. Rep. 1363, 69th Cong., 1st Sess.):

> Delay in criminal cases is already a grave subject of general criticism and to allow appeals in interlocutory matters would serve to bring the administration of criminal law into greater discredit.

The Senate Committee stated (S. Rep. 926, 69th Cong., 1st Sess.):

> * * * No such procedure is authorized or tolerated in the Federal system generally; * * *. Promptness in the dispatch of the criminal business of the courts is by all recognized as in the highest degree desirable. Greater expedition is demanded by a wholesome public opinion. If there is error

> in the action of the court in any interlocutory order, it may be reviewed on appeal from the final judgment. * * *

D. THE COURT BELOW WAS NOT AUTHORIZED TO ISSUE A WRIT OF MANDAMUS BECAUSE SUCH WRIT WAS NOT "NECESSARY" FOR THE EXERCISE OF THAT COURT'S APPELLATE JURISDICTION

Section 262 of the Judicial Code, from which circuit courts of appeals derive their power to issue writs of mandamus, authorizes district courts, circuit courts of appeals, and this Court to issue writs not specifically provided for by statute, "which may be necessary for the exercise of their respective jurisdictions."[22] In the case of circuit courts of appeals, this means writs which may be necessary for the exercise of *appellate* jurisdiction. *Whitney* v. *Dick*, 202 U. S. 132, 137, held that under Section 262 circuit courts of appeals have no authority to issue the auxiliary writs of habeas corpus and certiorari "except in cases where it [such writ] may be necessary for the exercise of a jurisdiction already existing." See *Adams* v. *McCann*, No. 79, decided December 21, 1942. But this interpretation of Section 262 would seem to have been qualified by *McClelland* v. *Carland*, 217 U. S. 268, which held that if the

[22] The Supreme Court, although not circuit courts of appeals, is authorized to issue mandamus by Section 234 of the Judicial Code (28 U. S. C., Sec. 342), which does not contain the above restrictive phrase. The power of this Court to issue mandamus might thus be broader than that of the circuit courts of appeals.

action of the district court "might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals," issuance of mandamus would be in aid of exercise of the appellate jurisdiction of the circuit court of appeals and therefore authorized. This Court said (p. 280):

> There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below. * * *

See also *Ex parte United States*, 287 U. S. 241, 246.

If the prohibition in R. S. 1011 against reversal by appellate courts applies to this case, circuit courts of appeals would have no appellate jurisdiction to protect;[22] issuance of a writ in such circumstance would clearly be unauthorized. *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U. S. 375. The remainder of our discussion on this point will assume that R. S. 1011 is not applicable.

[22] The fact that under the Criminal Appeals Act, as amended May 9, 1942, the court might have jurisdiction of an appeal by the Government if a plea in abatement were sustained does not enlarge its jurisdiction to reverse such pleas when they are not sustained. In the latter case, which is the situation at bar, the circuit court of appeals would still have no appellate jurisdiction over the plea.

Where an appeal in a case is pending before a circuit court of appeals, that court *is* vested with appellate jurisdiction, and under these circumstances determination of what writs are "necessary for" the exercise of that jurisdiction calls for a construction of the statute to the end that auxiliary writs be employed to achieve the ends of justice. *Adams* v. *McCann*, No. 79, this Term, decided December 21, 1942. But in the present case no appeal was pending before the court below when respondents applied for mandamus, so that this basis for jurisdiction present in the *McCann* case is lacking.

McClelland v. *Carland* indicates that a court may have appellate jurisdiction over a case which may, but has not yet, come before it. But the same decision shows that the possibility that a case may eventually reach, and thereby come within the appellate jurisdiction of, a circuit court of appeals is not in itself sufficient to justify the issuance of mandamus. Even where this is so, mandamus will not lie except where issuance of the writ is "necessary for the exercise of" the appellate jurisdiction, which means that it must in some way serve to aid or protect the jurisdiction of the appellate court.

No such showing can be made in the case at bar. The striking of the pleas would not stop the trial from going on or prevent respondents from appealing from a judgment of conviction. The

questions presented by the pleas could be reviewed on that appeal, just as are other interlocutory rulings of the trial court. The striking of the pleas would thus not prevent review of the questions they raise or in any other way defeat or impair the effectiveness of the exercise of appellate jurisdiction by the circuit court of appeals. Accordingly, the issuance of the writ cannot be regarded as in aid of or otherwise necessary to the jurisdiction of that court.

II

If It Be Assumed *Arguendo* That the Court Below Was Authorized To Issue Mandamus in This Case, the District Court's Order Striking Respondents' Pleas in Abatement Was Correct and Mandamus Should Therefore Have Been Denied.

A. The facts set forth in respondents' pleas do not adequately show noncompliance with the provisions of section 284 of the Judicial Code.

The court below has itself recognized that "it is uniformly held that a plea in abatement to an indictment, being a dilatory plea and not favored in law, must be pleaded with strict exactness, and with certainty, accuracy, and completeness, and must set forth facts, and not conclusions of law, nor evidence of facts, and that every inference must be against the pleader." *Olmstead* v. *United States*, 19 F. (2d) 842, 845 (C. C. A. 9), affirmed

on other points, 277 U. S. 438. Such a plea can be relied upon as a defense only when promptly pleaded and supported by definite factual averments, and when the grounds upon which abatement is sought are shown to have prejudiced the defendants.[24]

Section 284 of the Judicial Code (*supra*, pp. 2–3) provides that a district judge may authorize any grand jury to continue to sit during the term succeeding the term for which it was impaneled "solely to finish investigations begun but not finished by such grand jury."

Two pleas in abatement are involved in the present proceeding, one by the Carnation Company and one by the other respondents. The latter plea, which we shall consider first, does not independently aver that the grand jury had not begun an investigation of matters covered by the indictment during the November 1940 term (which expired March 2, 1941), but it makes such averment solely "on the basis" of the minutes of the grand jury for its meeting of February 27, 1941. The minutes for said meeting stated (R. 33–34, 44):

> The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and

[24] *Agnew* v. *United States*, 165 U. S. 36, 43–45; *Hyde* v. *United States*, 225 U. S. 347, 373–374; *Shushan* v. *United States*, 117 F. (2d) 110, 113 (C. C. A. 5), certiorari denied, 313 U. S. 574.

> Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Cherries.

After quoting the above, the plea makes the following averment (*ibid.*):

> The statement in said minutes, "investigation begun," with reference to the canned and evaporated milk industry is a conclusion of law, not supported by the facts stated in said minutes. *Said minutes show, and on the basis thereof said defendants allege*, that no investigation of any matter mentioned in said indictment and no investigation of any defendant joining in this plea was "begun," within the meaning of the Act of April 17, 1940 (U. S. C. 28: 421), on February 27, 1941, or at any other time during the said November 1940 term. [Italics supplied.]

The plea is therefore based entirely on minutes which not only do not support it but directly negative it, since the minutes state that during the November term the canned and evaporated milk industry was "named by witnesses and investigation begun."[25] This plea apparently first relies

[25] February 27, 1941, was during the November 1940 term, which expired on March 2, 1941 (R. 43).

on the minutes, and then denies what they aver. If the statement in the minutes, "investigation begun", is, as the plea avers, a conclusion of law, then the averment in this plea that no investigation was "begun" during the November term is equally a conclusion of law and is insufficient to support the plea.

The plea under consideration seems wholly without factual support unless it can be said that a court may take judicial notice that investigation of seven industries could not be "begun" by a grand jury, within the meaning of Section 284, on a single day. But when a witness before a grand jury brings to its attention a possible violation of law and the grand jury determines that the matter warrants further investigation, an investigation is then "begun". The "identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Blair* v. *United States*, 250 U. S. 273, 282.

The Government almost invariably makes its own investigation before presenting a violation of the antitrust laws to a grand jury. It is possible that witnesses (*e. g.*, employees of the Federal Bureau of Investigation) familiar with facts developed by the Government in its investigation of possible violations of the antitrust laws in particular industries appeared before the grand jury on February 27, 1941, and presented facts

which the grand jury considered warranted further investigation. It is also possible that these witnesses appeared before the grand jury on that date for the very purpose of giving that grand jury, then engaged in investigating possible violations of the antitrust laws in other industries, jurisdiction to investigate violations of law in these additional industries during an extended term of the grand jury. Such action would be an entirely reasonable one to meet a requirement of the law and would not in any way prejudice the rights of those who might ultimately be indicted as a result of the investigations thus begun.

The plea of the Carnation Company is similar, in character and effect, to the plea of the other respondents. The Carnation plea is composed of five separate pleas and the first three aver that the grand jury began its investigation of the matters covered by the indictment during the November term (R. 38–39). The last two aver that no such investigation was begun by the grand jury during the November term (R. 39–40); but the verification of the plea states that such averment is based on the minutes of the grand jury for its meeting of February 27, 1941, and the minutes are quoted in the verification (R. 42). The plea is thus insufficient if not supported by the minutes.

The plea of the Carnation Company and the plea of the other respondents also allege that the grand jury had not begun an investigation of any matter covered by the indictment prior to Feb-

ruary 27, 1941 (R. 40, 45–46). The pleas further allege that the order extending the term of the grand jury which was entered on February 28, 1941, recites that the matter came on to be heard at the request of the United States Attorney for an order authorizing the grand jury to continue to sit to finish "certain" investigations which it had undertaken but not finished during the November Term; that this request was filed with the court on February 26, 1941; and that the court's order of February 28 authorizing the grand jury to sit during the March term to finish "said" investigations accordingly did not include those begun on February 27 (R. 40, 45, 47, 48). We submit that both the United States Attorney's request and the court's order intended to and did embrace all unfinished investigations which had been begun by the time the court issued the requested order, and that the order of February 28, 1941, therefore covered investigations begun on February 27, 1941. We likewise submit that if there is doubt as to this conclusion, the defect in the court's order is one of form and is rendered harmless by Section 1025 of the Revised Statutes (18 U. S. C., Sec. 556), which provides that no indictment found by a grand jury, "shall be deemed insufficient * * * by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant * * *."

In short, we submit that the observations of Judge Healy in the court below are amply warranted (R. 147):

> Without at all questioning the motive of the petitoners, it is to be noted that their pleas in abatement contemplate nothing more nor less than a fishing expedition into the proceedings had before the grand jury relative to their case. Thus the accused, in advance of trial, may on purely speculative grounds obtain access to wholly privileged material. The trial judge committed no error in striking the pleas for insufficiency.

B. WHERE A GRAND JURY DULY IMPANELED AND DULY EXTENDED TO A SECOND TERM RETURNS AN INDICTMENT IN A MATTER INVESTIGATION OF WHICH WAS NOT BEGUN DURING ITS FIRST TERM, THIS IS NOT GROUND FOR ABATING THE INDICTMENT.

Respondents have not heretofore suggested any reason why the interests of those accused of crime are prejudiced if a grand jury, whose term has been extended, first begins the investigation leading to an indictment during the extended term. The legislative history of the pertinent provisions of Section 284 strongly indicates that these provisions were not enacted to confer additional protection upon those accused of crime.

Prior to the Act of February 25, 1931, 46 Stat. 1417, which amended Section 284, Judicial Code, there was no federal statute authorizing an extension of the term of a grand jury, but certain

district courts had adopted the practice of authorizing grand juries to continue to sit beyond the term for which they were impaneled, in order to complete unfinished investigations, and indictments returned by such extended grand juries had been held valid by two circuit courts of appeals and by a district court in a third circuit.[26] In 1923 the Attorney General advised Congress that he feared to risk any important case, especially one where the statute of limitations would run before the question could be settled by this Court, by retaining a grand jury beyond its term and requested that all doubts upon the subject be removed by legislation. S. Rep. No. 1189, 67th Cong., 4th Sess. The Attorney General renewed his recommendation in succeeding Congresses and the proposed legislation was enacted in 1931.[27]

The provision that the terms of grand juries might be extended solely to finish investigations begun during the term preceding extension was undoubtedly adopted in order not to impose upon grand jurors the burden of serving during more than one term of court unless such extended service would avoid the duplication in time and effort involved in presenting to a new grand jury the facts developed in an investigation which an

[26] *Elwell* v. *United States*, 275 Fed. 775, 777 (C. C. A. 7); *Johnson* v. *United States*, 5 F. (2d) 471, 473 (C. C. A. 4); *United States* v. *Rockefeller*, 221 Fed. 462, 466 (S. D. N. Y.).

[27] H. Rep. No. 366, 68th Cong., 1st Sess.; S. Rep. No. 1401, 70th Cong., 2d Sess.; S. Rep. No. 877, 71st Cong., 2d Sess.

earlier grand jury had been unable to complete. When the Act of April 17, 1940, 54 Stat. 110, changed the maximum time during which a grand jury could be required to serve from "three terms" to "eighteen months," there was added a proviso, obviously adopted for the benefit of grand jurors, that the court may at any time after the end of the term for which the grand jury was originally summoned, excuse any grand juror and summon another person in his place.

We submit that the limitation respecting unfinished investigations is directory, in the sense that if a grand jury, duly impaneled and duly extended, returns an indictment for an offense investigation of which was first begun during the extended term, this does not constitute ground for abating the indictment. This interpretation of Section 284 would not mean that the limitation as to unfinished investigation would be without effect. It would have the effect of authorizing extension of a grand jury only when, at the time of extension, it had begun but not finished an investigation. It would have the further effect that any grand jury might properly decline to begin a new investigation during its extended term.

But even if the limitation as to unfinished investigations is not thus construed to be directory, a plea that an indictment be abated because of failure to observe this limitation calls for a strict application of the rule (*supra*, pp. 37–38) that an abatement plea based upon alleged irregularity in

the grand jury procedure must be supported by an allegation of prejudice to the defendant. In the present situation, that means that respondents must prove that they were injured by having their case presented to the extended rather than to another grand jury. The pleas of the respondents make no such allegation.

CONCLUSION

It is respectfully submitted that the judgment of the circuit court of appeals should be reversed, with directions to dismiss the petition for writ of mandamus.

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